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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY and HILLTOP LINCOLN MERCURY, INC.,
Petitioners,

vs.

THADDEUS S. MURPHY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Under the Truth In Lending Act and Regulation Z thereunder, is an assignment of returned or unearned insurance premiums a "security interest" requiring disclosure on the face of an automobile retail installment sales contract?

2. Should any ruling that the Truth In Lending Act and Regulation Z thereunder require disclosure of the assignments of returned or unearned insurance premiums as a "security interest" be made prospective only where case law on the issue conflicted at the time of execution of the contract *sub judice?*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Ford Motor Credit Co. and Hilltop Lincoln Mercury, Inc. (hereinafter jointly referred to as "Ford Credit") pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Eighth Circuit entered in this cause on August 28, 1980. That decision clearly presents two important issues, on one of which the Courts of Appeal are now split.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1) is reported at 629 F.2d 556. The August 29, 1979 opinion of the District Court (A-13) is reported at 477 F.Supp. 59. The November 14, 1979 opinion of the District Court is not reported (A-18).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 28, 1980. The order denying defendant's timely Petition for Rehearing was entered on September 23, 1980. (A-24). This Petition was filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statute and regulations involved in this case are:

Consumer Credit Protection Act, §128(a)(10)(15 U.S.C. §1638(a)(10)):

Sales Not Under Open End Credit Plans.

A. In conection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

* * *

10. A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

Regulation Z, 12 CFR §226.2(gg) (1980):

> "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded,

mechanic's, materialmen's, artisan's and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

Regulation Z, 12 CFR §226.8(b)(5) (1980):

(b) **Disclosures in Sale and Nonsale Credit.** In any transaction subject to this section, the following items, as applicable, shall be disclosed:

* * *

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates, or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, or other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such

property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

STATEMENT OF THE FACTS

On March 19, 1978, plaintiff, Thaddeus S. Murphy, purchased an automobile from Hilltop pursuant to a Missouri Automobile Retail Installment Contract (the "Contract"), a copy of which is attached at the end of this Petition. Hilltop subsequently assigned the Contract to Ford Credit.

The face of the Contract (the "disclosure statement" under the Truth In Lending Act) contains certain disclosures as required by the Truth In Lending Act (the "Act"), 15 U.S.C. §1601 *et seq.* In Paragraph 13, the Contract disclosed the security interest acquired by Ford Credit as follows:

> Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

Paragraph 18, on the reverse side of the Contract, requires the buyer to purchase and maintain in force physical damage insurance on the vehicle. That paragraph also provides:

> Buyer hereby assigns to Seller any monies payable under such [physical damage] insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

Under the assignment provision quoted above, upon cancellation of the physical damage insurance policy, any unearned premiums will be used to provide replacement insurance coverage or will be applied to the debt. This assignment of unearned premiums assures the continued existence of the insurance on the vehicle during the life of the loan. Without such protection, debtors could cancel the insurance on financed vehicles in order to obtain the return of unearned insurance premiums, thereby exposing lenders to the risk of uninsured collateral.

On October 13, 1978, the plaintiff filed a single-count Complaint against Ford Credit alleging that Ford Credit violated the Act because the Contract failed to properly disclose the identity of Ford Credit as a creditor.

On March 30, 1979, District Judge Harper granted plaintiff's motion to amend the Complaint. The Complaint as amended alleged, inter alia, that the defendants failed to disclose a security interest in returned or unearned physical damage insurance premiums (hereinafter "unearned insurance premiums"). On August 29, 1979, Judge Harper entered judgment in favor of the plaintiff, holding that the Contract did not properly disclose such interest. At the same time, Judge Harper granted judgment in favor of the defendants on the other allegations contained in the Complaint and that ruling is not a subject of this appeal. Following a subsequent hearing, the District Court made an award of fees to Murphy's counsel. The Court of Appeals remanded the award for further consideration. No final award of attorney's fees has been made, however that subject is not at issue here.

Ford Credit appealed the August 29, 1979 judgment of the District Court. The United States Court of Appeals for the Eighth Circuit affirmed the judgment in its opinion rendered August 28, 1980.

Subsequent to the August 28, 1980, decision of the Eighth Circuit Court of Appeals, Ford Credit and Anderson Bros. Ford, Inc. petitioned this Court for a Writ of Certiorari to the Seventh Circuit, seeking review of a Seventh Circuit decision on the same issues. (*Anderson Bros. Ford and Ford Motor Credit Co.* v. *Valencia and Gonzalez,* No. 80-84). Ford Credit and Hilltop then timely moved the Eighth Circuit Court of Appeals for a rehearing or, alternatively, for a stay of mandate until this Court ruled on the Petition filed by Ford Credit in *Valencia and Gonzalez.* The Eighth Circuit denied Ford Credit's motion on September 23, 1980, leaving the matter ripe for appeal to this Court.

This Court subsequently granted Ford Credit's Petition for Writ of Certiorari in Case No. 80-84, *Anderson Bros. Ford and Ford Motor Credit Co.* v. *Olga Valencia and Miguel Gonzalez,* (49 U.S.L.W. 3343).

REASONS FOR GRANTING THE WRIT

The Contract at issue here is identical to millions of outstanding installment contracts. These contracts are lawful under the Act in the Tenth Circuit, but the Eighth, Seventh, Fifth and Third Circuits have held that they violate the Act.[1]

The conflicting decisions of the Circuit Courts cannot be reconciled. The Ford Credit Contract which the Tenth Circuit held to be legal in *James* is identical in all material respects to the contract at issue below and to the contract before this Court in *Valencia*. The Tenth Circuit expressly rejected the findings of the Third, Fifth and Seventh Circuits that the Contract violated the Act's disclosure requirements. Petitioners contend that only the Tenth Circuit has correctly followed this Court's reasoning in *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 100 S.Ct. 790 (1980), and the legislative history of the Truth In Lending Act.

Even if the Court below decided the disclosure issue correctly, it should have made its decision prospective only. The Contract's disclosure statement fully complied with substantial judicial precedents at the time the Contract was executed. Retroactive application of the decision below would serve no federal purpose and would threaten grossly inequitable consequences.

Only this Court can resolve the conflict among the Circuits and settle this issue of tremendous importance to the credit industry and the millions of consumers being served by it.

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[1] *Compare James* v. *Ford Motor Credit Co.*, No. 78-1806 (10th Cir. June 24, 1980) (A-25) (disclosured not required) *with* the opinion below; *Ford Motor Credit Co.* v. *Valencia,* 617 F.2d 1278 (7th Cir. 1980), *cert. granted* ___ U.S. ___, ___ 49 U.S.L.W. 3343 (November 11, 1980; *Edmondson* v. *Allen-Russell Ford, Inc., supra;* and *Gennuso* v. *Commercial Bank & Trust Co.*, 566 F.2d 437 (3d Cir. 1977) (disclosured required).

I. The Decision Below Is In Direct Conflict With The Tenth Circuit Decision In James v. Ford Motor Credit Co., And Is Identical To That Of The Seventh Circuit In Valencia v. Ford Credit, Now On Appeal To This Court Pursuant To Its Grant Of Certiorari.

The decision below is one of four decisions by different Circuit Courts of Appeal which considered the same legal issue in connection with identical contract forms prepared by Ford Credit. The decision below, the Fifth Circuit's decision in *Edmondson* and the Seventh Circuit's decision in *Valencia* held that the form violated the Act by not disclosing on the face of the Contract the assignment of unearned insurance premiums contained on the Contract's reverse side. In contrast, the Tenth Circuit's June 24, 1980 decision in *James* (A-25) held that the Act does not require such a disclosure.

A. The Tenth Circuit Correctly Decided That Congress Did Not Intend The Act To Require Disclosure Of An Assignment Of Unearned Insurance Premiums.

The Act requires the disclosure of "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." 15 U.S.C. §1638(a)(10). The Act does not define the term "security interest." Regulation Z, 12 CFR §226.2(gg), provides that "security interest" means "any interest in property which secures payment or performance of an obligation." The Regulation does not state whether the assignment provision at issue here constitutes such an interest.[2]

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[2] A *Caveat* from this Court's recent *Milhollin* decision, 100 S.Ct. at 797 is applicable here:

> [L]egislative silence is not always the result of a lack of prescience; it may instead be token permission or, perhaps, con-

The purpose of the Act is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . ." 15 U.S.C. §1601. Both the Courts and Congress have recognized that too much detail in disclosure statements can defeat the purpose of the Act by making them complicated and unreadable. The Tenth Circuit in *James* properly focused its analysis on whether disclosure of such assignment provisions would truly further the purpose of the Act, or tend to hinder it.

The Tenth Circuit quoted with approval (A-31) from *Milhollin, supra,* 100 S.Ct. at 798, as follows:

> The concept of 'meaningful disclosure' that animates TILA (citation omitted) cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather it describes a balance between 'competing considerations of complete disclosure . . . 'informational overload.'

The Tenth Circuit then analyzed the legislative history of the 1980 amendments to the Act (discussed *infra*) and concluded that "the Act does not require, and Congress did not intend it to require, an exemplification of that interest [in unearned insurance premiums] on the face of the installment contract." (A-32)

The Court below relied upon the definition of "security interest" in Regulation Z, 12 CFR §226.2(gg), quoted *supra,* to find that the assignment of unearned insurance premiums con-

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sidered abstention from regulation. In that event, judges are not accredited to supercede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

stitutes a security interest. The Eighth Circuit cited the Seventh Circuit's decision in *Valencia & Gonzalez* in support of that conclusion. (A-4-6). The Court found the provisions of the Truth In Lending Simplification and Reform Act of March 31, 1980 and the legislative history of that Act to be inapplicable.

> [T]his new Act does not take effect for two years from the date of its enactment (Section 625 of the Act), and the present action arises out of, and is controlled by, the existing Act.

It made no attempt to consider whether its finding was consistent with Congressional intent and, in fact, did not attempt to determine what the intent of Congress was. The Court of Appeals also failed to consider in its opinion the extent to which requiring disclosure of an assignment of insurance premiums would, as warned of by this Court in *Milhollin,* undermine the purpose of the Act by unduly complicating the disclosure document.

B. Disclosure Of An Incidental Interest In Unearned Insurance Premiums Is Inconsistent With Congressional Intent.

As noted above, Congress intended the Act to promote "meaningful disclosure of credit terms." However, Congress became concerned that overly technical judicial decisions were defeating that purpose by requiring too much complexity in disclosure statements. This concern was expressed in the Report of the Senate Committee on Banking, Housing and Urban Affairs, S. Rep. No. 96-73, 96th Cong., 1st Sess. 2 (1979), *reprinted in* [1980] U.S. Code Cong. and Adm. News 878, 879 (May, 1980 supp.):

> There is considerable evidence, for example, that disclosure forms given consumers are too lengthy and difficult to understand. Creditors, on the other hand, have encountered increasing difficulty in keeping current with a

> steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions.

On March 31, 1980, the President approved the Truth In Lending Simplification and Reform Act (the "Simplification Act") as Title VI of P.L. 96-221. 94 Stat. 132, 168. Under Section 614(a)(9) of the Simplification Act, 94 Stat. 179, when the credit is secured the creditor shall disclose "a statement that a security interest has been taken in (a) the property which is purchased as part of the credit transaction or, (b) property not purchased as part of the credit transaction identified by item or type."

The legislative history makes it clear that Congress did *not* intend this section to require the disclosure of "incidental interests" such as assignment of unearned insurance premiums:

> When a security interest is being taken in property not purchased as part of the credit transaction, the Committee intends this provision to require a listing by item or type of the property securing the transaction, *but not a listing of related or incidental interests in the property.* For example, a loan secured by an automobile (not purchased with the proceeds of the loan) would require a statement indicating that the loan is secured by an automobile *but would not require a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums,* rights arising under, or waived in accord with state law, accessions, accessories, or proceeds. (emphasis added).

S. Rep. No. 96-368, 96th Cong., 1st Sess. 30 (1979) *reprinted in* [1980] U.S. Code Cong. and Adm. News 834, 864 (May, 1980 supp.).

Congress adopted this amendment to clarify its intent in enacting the original Act. As noted above, Congress was critical of the "highly technical judicial decisions" which have caused creditors to issue lengthy disclosure statements "written in

legalistic fine print," resulting in "a piece of paper which appears to be 'just another legal document' instead of the simple, concise disclosure form Congress intended." S. Rep. No. 96-73 at 3, [1980] U.S. Code Cong. and Adm. News at 879-80.

The Tenth Circuit, in *James,* correctly considered this legislative history, and correctly concluded that Congress did not intend to require the disclosure of an assignment of unearned insurance premiums on the face of the installment contract. (A-25).

C. This Court Has Granted Certiorari To Review This Same Issue In Anderson Bros. Ford And Ford Motor Credit Co. v. Valencia & Gonzalez, No. 80-84.

Subsequent to the Eighth Circuit's decision in this case, Ford Credit and Anderson Bros. Ford petitioned this Court for Writ of Certiorari to review the decision of the Seventh Circuit in *Valencia & Gonzalez* v. *Anderson Bros. Ford and Ford Motor Credit Co.,* 617 F.2d 1278 (7th Cir. 1980). Petitioners in this action filed with the Eighth Circuit a Motion For Rehearing, and based upon the outstanding Petition filed in Valencia, an Alternative Motion for Stay of Mandate. Both parts of the Petitioners' motion were denied. (A-24).

This Court has granted a Writ of Certiorari in the *Valencia* case. *Anderson Bros. Ford and Ford Motor Credit Co.* v. *Olga Valencia and Miguel Gonzalez,* No. 80-84, 49 L.W. 3343 (Nov. 11, 1980). That Petition raises the same issue with reference to an identical contract. Because the Eighth Circuit Court of Appeals refused to stay its mandate in this matter, its judgment would be binding upon Ford Credit even if this Court should reverse the decision of the Seventh Circuit Court of Appeals in *Valencia & Gonzalez.*

This Court may, on the motion of a party or on the Court's own motion, defer consideration of a petition for certiorari until a decision is reached by the Court in a pending case raising

similar issues. *See Murray* v. *City of New York,* 308 U.S. 528, (1940). Petitioners respectfully submit that this is a proper case for such deferral since resolution of the question presented in *Valencia* will dispose of the identical question presented herein.

II. The Opinion Below Conflicts With The Federal Reserve Board's Proposed Official Staff Interpretation Of Regulation Z Holding That A Creditor Need Not Disclose Its Right To Receive Unearned Insurance Premiums As A Security Interest.

A. The Reserve Board's Proposed Opinion Supports Ford Credit's Position.

In response to the Circuit Court decisions on this issue, the staff of the Federal Reserve Board has proposed a staff opinion which supports the position taken by Ford Credit in this Petition and that of the Tenth Circuit in *James.*

The Court below held that the definition of security interest contained in Regulation Z, 12 CFR §226.2(gg), clearly includes an assignment of unearned insurance premiums. As noted above, this interpretation is in direct conflict with the interpretation of the Tenth Circuit.

The Federal Reserve Board, the agency entrusted by Congress with the regulatory interpretation of the Truth In Lending Act, has proposed an official interpretation in accord with the Tenth Circuit's opinion that an assignment of unearned insurance premiums does not constitute a security interest. Board of Governors of the Federal Reserve System, Proposed Official Staff Interpretation No. FC-0173, September 18, 1980. (A true copy of that proposed interpretation is attached hereto, (A-37). In the proposed interpretation, the Board states:

> The staff believes that a creditor is not required by this section to disclose its right to receive insurance proceeds or unearned insurance premiums. . . . Truth In Lending

disclosures are meant to provide useful information to consumers to enhance credit shopping. Consumers do need to know that they risk the loss of certain property if they default. The disclosures under Section 226.8(b)(5) inform consumers of which property is subject to that risk at the time the credit decision is being made. We believe that information regarding the creditor's interest in insurance proceeds and unearned premiums would not be used in comparison shopping. Although a technical reading of the security interest definition might cover a creditor's interest in insurance proceeds and unearned premiums, it is our opinion that such incidental interests are not the type of interests meant to be covered by Section 226.8(b)(5).

The Staff recognizes that there are a number of Circuit Court decisions to the contrary. We believe, however, that our position better serves the purpose of the statute and the regulation to convey in a meaningful way information that can be used by consumers in shopping for credit.

One of the Circuit Courts which has disagreed with this position has recognized the Board's power to interpret the Truth In Lending Act by this method. The Court of Appeals for the Seventh Circuit advised that, "Any misgivings which creditors may have about the technical nature of the requirements should be addressed to Congress or to the Federal Reserve Board not to the Courts." *Valencia & Gonzalez* v. *Anderson Brothers Ford & Ford Motor Credit Co.*, 617 F.2d at 1286. In fact, §1640(f) of the Act allows creditors to rely on a final official Board interpretation as a complete defense in drafting their contract forms.

The clear definition contained in Regulation Z has been interpreted by the three Circuits to include an assignment of unearned insurance premiums, and by one Circuit to exclude such assignments. The Federal Agency responsible for interpretation of the Act and promulgation of Regulations thereunder, has

now responded and has clearly expressed its opinion regarding the scope of the term "security interest" in the Act. Only this Court can resolve the conflict and apply the Act in accordance with Congress' intentions with respect to those creditors affected by the decisions of the Third, Fifth, Seventh and Eighth Circuits.

B. The Decision Below Incorrectly Interprets The Federal Reserve Board's Earlier Regulations And Interpretations.

As previously noted, the Federal Reserve Board ("Board"), which interprets the Act, has already defined "security interest" in Regulation Z, 12 CFR §226.2(gg) (1980), as "any interest in property which secures payment or performance of an obligation." The Regulation also gives some specific examples of what the Board had in mind:

> . . . security interests under the Uniform Commerical Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialman's, artisans, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

These examples clarify the Board's statement that the Regulation focuses on security interests, the purpose and function of which is to secure the debt — not on interests in property which are incidental to the consumer transaction. The opinion below misinterpreted the clear import of the Regulation.

The staff of the Board has explained that the purpose behind disclosure of security interests is to inform the debtor that he may lose certain property in order to satisfy the debt if he

defaults.[3] The right to receive unearned insurance premiums is wholly unrelated to the consumer's default or to satisfaction of the debt. The existence of the unearned premiums depends upon the cancellation of coverage, a decision not automatically triggered by a default in payment of the underlying debt. Moreover, from the moment of issuance of physical damage insurance which names the lender as a loss payee, the property interests in the policy are at least joint, and in fact belong more to the lender than the debtor as long as the debt remains unpaid. Disclosure of the assignment of unearned premiums as a security interest would simply not serve the purpose for which the Board views such disclosures to be intended by the Act — to let the borrower know what property *belonging to him* will be reachable on default.

Though the assignment at issue does provide some security to the lender, its disclosure simply does not fit in with the regulatory scheme and the Congressional purposes behind it. As one District Court has noted:

> Both the assignment of unearned premiums and the assignment of insurance proceeds do provide some benefit and protection to the lender. But neither of those provisions subject the debtor's property to any lien or risk. Rather, the insurance provisions of the agreement are properly construed as being mutually protective of the interests of both the debtor and the creditor.
>
> * * *
>
> If such ephemeral interests are to be deemed to be security interests within the disclosure requirements of the Act, that determination should emanate from Congressional enact-

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[3] Federal Reserve Board Staff Opinion No. 1066 [1974-77 Special Releases Transfer Binder] Cons. Cred. Guide (CCH) ¶31,406 (June 4, 1976).

ment or from a determination of the Board, not from a judicial decree.

Rounds v. *Community National Bank,* 454 F.Supp. 883, 888 (S.D. Ill. 1978).

Congress and the Board have determined that an assignment of unearned insurance premiums need not be disclosed. The judicial decrees of three Circuit Courts now stand as the sole non-conforming interpretations of the terms of the Act and Regulation Z.

III. The Decision Below, If Affirmed, Should Be Given Prospective Application Only.

Although the dollar amount involved in this case is small, a staggering number of transactions could be subject to attack under a retroactive application of the decision below.[4] The contract complied with judicial precedents prevailing at the time it was signed. Retroactive application of the Court of Appeals' decision would further no purpose of the Act, and a retroactive application of the decision below would be grossly inequitable.[5]

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[4] There are now nearly one hundred cases pending against Ford Credit alone (including one brought as a class action) which raise the issue decided below. Ford Credit urges this Court to reverse the decision below, and prevent any further application of its holding — prospective or retroactive. However, if this Court affirms the decision below, prospective relief is proper in this case under the guidelines established by this Court in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106-07 (1971).

[5] There is judicial precedent for giving only prospective application to a Truth In Lending decison. *McDaniel* v. *Fulton National Bank,* 571 F.2d 948 (5th Cir.) (*en banc*), *reh. denied,* 576 F.2d 1156 (5th Cir. 1978).

The Court of Appeals refused to give its decision prospective application only because it did not find that retroactive application of its ruling would impede the operation of the Truth In Lending Act or cause undue hardship. (A-9).

In its interpretation of *Chevron Oil Co.* v. *Huson,* 400 U.S. 97 (1971), the Court of Appeals found that retroactive application would not *impede* the operation of the Truth In Lending Act, but it failed to consider whether retroactive application would further any purpose of that Act. Yet, this Court's decision in the *Chevron Oil Co.* case stated that, in ruling on whether retroactive application of a decision was proper, the Court must look at whether "retrospective operation will further or retard [the statute's] operation." The Court of Appeals simply never considered whether retroactive application of its decision would further the purpose of assuring "a meaningful disclosure of credit terms." The opinion did not dispute that the violation of the Act alleged here is purely technical. *See, Valencia & Gonzalez* v. *Ford Motor Credit Co. and Anderson Bros. Ford,* 617 F.2d 1278, 1293 (7th Cir. 1980) (Cudahy J., concurring). The Court merely stated, "we decline at this time to limit any retroactive effect our decision may have." (A-9).

As noted above, Congress has adopted the Simplification Act to "eliminate litigation based on purely technical violations of the Act." S. Rep. No. 96-73 at 17 [1980? U.S. Code Cong. and Adm. News at 892. That act will not become effective, however, for two years. 94 Stat. 185. Until that Act does become effective, only a decision by this Court will avoid the harsh result which would occur if the decision below — involving a purely technical and highly debatable claim under the Truth In Lending Act — were applied retroactively.

Prospective application in this case would be in accord with the intent of both the legislative and executive branches of the government as expressed in the Simplification Act. The opinion below ignored that intent. In light of the intent clearly expressed

by both Congress and the Federal Reserve Board with respect to the Simplification Act, retroactive application of a contrary and purely judicial interpretation presents the kind of inequity envisioned by this Court in *Chevon Oil* as a justification for prospective application of a judicial ruling. Prospective application of any ruling in this case would compliment the efforts of both the legislative and executive branches of the government and would be in accord with this Court's standard as enunciated in *Chevron*.

CONCLUSION

For all of the reasons stated above, we urge the Court to grant a Writ of Certiorari to review the opinion in this case so that the Court may resolve conflicts among the circuits presented herein and introduce some certainty into an area of the law which has a profound impact on the nation's credit economy. In the alternative, we ask that the Court delay its ruling upon this Petition until such time as it has ruled upon the *Valencia, supra,* case.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 79-1822
No. 79-2061

Thaddeus S. Murphy,
Appellee,

v.

Ford Motor Credit Co.
and Hilltop Lincoln
Mercury, Inc.,
Appellants,

Thaddeus S. Murphy,
Cross-Appellant,

v.

Ford Motor Credit Co.
and Hilltop Lincoln
Mercury, Inc.,
Cross-Appellees.

Appeals from The United States District Court
for The Eastern District of Missouri, Eastern Division

Submitted: May 20, 1980
Filed: August 28, 1980

Before HENLEY and McMILLIAN, Circuit Judges,
and ROY,* Judge.

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*The Honorable Elsijane T. Roy, Judge, United States District Court for the Eastern and Western Districts of Arkansas, sitting by designation.

ROY, District Judge.

This appeal is brought by Ford Motor Credit Corporation ("Ford") and Hilltop Lincoln Mercury ("Hilltop") from a decision in the District Court[1] in favor of the plaintiff, Thaddeus Murphy ("Murphy"), on an allegation of a violation of the Consumer Credit Protection Act. This Act is known as the "Truth In Lending Act" (TILA), and is found at 15 U.S.C. §§ 1601, *et seq.* TILA has been translated into regulations by the Federal Reserve Board, those regulations being in the form of "Regulation Z", found at 12 C.F.R. §§ 226.1, *et seq.* Those portions of TILA and Regulation Z which are at issue herein are 15 U.S.C. § 1638(a)(10) and 12 C.F.R. § 226.8(a)(1)(5) which relate to the disclosure of security interests created in favor of lenders.

Jurisdiction in District Court was predicated on 15 U.S.C. § 1640(e) and in this Court is based on 28 U.S.C. §§ 1291 and 1294.

In the trial court, Murphy alleged that appellants failed to disclose the identity of Ford as a creditor, failed to identify all of the property to which the security interests related, failed to disclose the right to accelerate on default, failed to put all required disclosures on the same side of the page, failed to put the required disclosures in meaningful sequence, and failed to provide Murphy and his co-signer with a written disclosure statement. Murphy prevailed only on the allegation that the security interest created in favor of Ford by the assignment of any returned or unearned insurance premiums was not disclosed as such security interests are required to be by the Act. Appellants brought this appeal, alleging that the assignment of the premiums did not amount to a security interest and that the

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[1]The Honorable Roy W. Harper, Judge, Eastern District of Missouri, Eastern Division.

District Court erred in that determination. Murphy filed a cross-appeal based on the amount of attorney's fees which was awarded, claiming that $500.00 was insufficient.

The section of the installment sales agreement which is the subject of this appeal stated, on the back of the instrument:

> The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interest of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require . . . .
>
> Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller is hereby authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of the Seller.

The District Court, relying on *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979), held that the assignment of insurance premiums was a security interest as contemplated by 15 U.S.C. § 1638(a)(10) and that appellants' failure to disclose it as such constituted a violation of TILA.

The facts indicate that in March of 1978 Murphy purchased from Hilltop a 1977 Lincoln automobile. Murphy paid $1,300.00 as a down payment and financed the remainder. Murphy signed a retail installment loan contract for the amount remaining, and it was understood that the actual financing would be arranged through Ford.

Appellee filed this action against the appellants and at the close of the trial, the court found that the Act had been violated by both appellants and imposed the maximum statutory damages of $1,000.00 and awarded Murphy $500.00 for attorney's fees.

The issues presented by this appeal are, first, whether the District Court erred in its conclusion that the assignment of returned or unearned insurance premiums was a security interest which was required to be disclosed as such on the face of the contract or on the disclosure statement; and, second, whether the District Court abused its discretion in the award of attorney's fees of only $500.00 in light of the attorney's testimony that he spent 49.7 hours in preparation for and participation in the trial.

At the outset we note that three other circuit courts have determined that the assignment of unearned or returned insurance premiums in a retail installment contract does amount to a security interest and should be disclosed as such. *Valencia & Gonzalez* v. *Anderson Bros. Ford, et al,* _____F.2d _____ (7th Cir. Mar. 20, 1980); *Edmondson* v. *Allen-Russell Ford, Inc., supra; Elzea* v. *National Bank of Georgia,* 570 F.2d 1248 (5th Cir. 1978); *Gennuso* v. *Commercial Bank & Trust Co.,* 566 F.2d 437 (3d Cir. 1977). However, the Tenth Circuit, to some extent, has held to the contrary. *James* v. *Ford Motor Credit Co.,* _____F.2d _____ (10th Cir. June 24, 1980), and *Hernandez* v. *O'Neal Motors, Inc.,* _____F.2d _____ (10th Cir. June 24, 1980).

15 U.S.C. § 1638(a)(10) requires that the retention or acquisition of any security interest by a creditor in a consumer transaction be disclosed. However, "security interest" is not defined in TILA; rather, Congress left that detail to the Federal Reserve Board which was charged with promulgating the regulations required for the implementation of the Act. In response, the Board formulated Regulation Z. "Security interest" is defined therein at 12 C.F.R. § 226.2(gg) as follows:

> . . . any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

The appellants admit, in their brief, that the purpose of the assignment clause, or one of the purposes, is to use those returned or unearned premiums to apply to the debt of the debtor for the car. Appellants argue that the amount of such premiums would not be enough to offset any substantial portion of the debt owed on a car. Nevertheless, the definition given in the pertinent clause of Regulation Z does create an interest on the part of the creditor which secures payment or performance of an obligation. Therefore, the arguments of the appellants must fail under the clear definition of security interests.

As stated in *Valencia & Gonzales, supra,* at p. 12 of the slip opinion:

> Application of the Regulation Z definition of "security interest" in this case, as in *Edmondson,* poses no special problems. It is not seriously disputed that the assignment of unearned insurance premiums confers on the creditor an interest in property. Even the defendants refer to the assignment as an "incidental interest in property." Brief of Appellants at 8. Whether incidental or not, we agree with the Fifth Circuit that such an assignment is an interest in property. 577 F.2d at 294. Similarly, we agree that this property interest secures the performance or payment of an obligation. The assigned premiums may be used, in the

> sole discretion of the creditor, to purchase replacement insurance coverage or to pay part of the debtor's indebtedness. *In either case, the assignment secures an obligation of the debtor. Id.* at 294. The Creditor has the authority to cancel the insurance and cause payment of the unearned premiums to itself at any time. The contract clearly gives the creditor an interest in property which secures performance of a debtor's obligation. Such an interest is by definition a security interest for TILA purposes. 12 C.F.R. § 226.2(gg), and as such must be disclosed. Defendants do not suggest that such disclosure was made in the contract before us. (emphasis supplied)

Herein, the appellants concede that the assignment creates an "interest" in favor of the lender, albeit "incidental." The purpose of the assignment is to secure the payment or performance of the debtor's obligation, however small the amount of the unearned or returned premiums might be. The application of the proceeds of the insurance, whether in the form of an indemnity or returned or unearned premiums, places the assignment squarely within the definition of a security interest under Regulation Z. Undeniably, the premiums would go to secure "payment or performance of an obligation," *i.e.*, the payment of the principal and interest of the amount of the loan to the debtor.

While we recognize that state law may be a factor in determining whether a security interest has been created in a given situation, an interest may, nevertheless, be a security interest for purposes of TILA even though it is not an enforceable security interest under state commercial law. *Valencia & Gonzalez, supra; Bulger* v. *Thorp Credit, Inc. of Illinois,* 609 F.2d 1255 (7th Cir. 1979). Appellants argue that the assignment does not amount to a traditional security interest. However, the Federal Reserve Board's definition of a security interest is considerably broader than the concept of security interests in the Uniform Commercial Code.

The provisions of TILA and Regulation Z, as remedial legislation, are to be broadly construed in favor of the consumer in order to implement Congressional intent and purpose. *Griffith* v. *Superier Ford,* 577 F.2d 455, 457 (8th Cir. 1978); *Sellers* v. *Wollman,* 510 F.2d 119, 122 (5th Cir. 1975). The adoption of the Act in 1968 was premised on a Congressional finding that economic stabilization and competition in the credit industry would be promoted by the informed use of credit. 15 U.S.C. § 1601. The Congressional intent was to regulate disclosure in an industry which had previously been an example of the doctrine of *caveat emptor.* "Congress has determined that such purchasers are in need of protection." *Mourning* v. *Family Publication Service,* 411 U.S. 356 (1973).

In support of their position, appellants have directed this Court's attention to the new Truth in Lending Simplification and Reform Act of March 31, 1980. The legislative history to this Act states:

> The security interest disclosure is also simplifed to eliminate the technical disclosure of the type of security interest taken. When a security interest is being taken in property purchased as part of the credit transaction, this section requires a statement that a security interest has been or will be taken in the property purchased. When a security interest is being taken in property not purchased as part of the credit transaction, the Committee intends this provision to require a listing by item or type of the property securing the transaction, but not a listing of related or incidental property. For example, a loan secured by an automobile (not being purchased with the proceeds of the loan) would require a statement indicating that the loan is secured by an automobile but would not require a listing in incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums, rights arising under or waived in accord with state law, accessions, accessories, or proceeds.

> Senate Committee Report, CCH Extra Edition No. 810, ¶ 2096 at 237.

However, this new Act does not take effect for two years from the date of its enactment (§ 625 of the Act), and the present action arises out of, and is controlled by, the existing Act.

We find the decisions of the Third, Fifth and Seventh Circuits to be logical and reasonable interpretations of the Act. In light of the reasoning of those decisions and the definition of "security interest" by the Federal Reserve Board, we feel compelled to resolve the issue herein in favor of the appellee.

Appellants have argued in the alternative that, if this Court affirms the District Court, the effect of the decision should be prospective, not retroactive, except as to the plaintiff.

The criteria for determining whether a decision should be given nonretroactive effect are contained in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, whether by overruling clear past precedent on which litigants may have relied, see, *e.g., Hanover Shoe* v. *United Shoe Machinery Corp., supra,* at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g., Allen* v. *State Board of Elections, supra,* at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra,* at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis

> in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* at 706.

See, also, *Simpson* v. *Union Oil Co.,* 396 U.S. 13 (1969); *Schaefer* v. *First National Bank of Lincolnwood,* 509 F.2d 1287 (8th Cir. 1975); *Shea* v. *City of St. Paul,* 601 F.2d 345, 350-51 (8th Cir. 1979); and *Rudolph* v. *Wagner Electric Corp.,* 586 F.2d 90 (8th Cir. 1978).

We have reviewed the facts at bar in light of all of the *Chevron* principles. In particular, we note that appellants have not persuaded us that retroactive application of our ruling will impede the operation of TILA or cause undue hardship or produce inequitable results. Thus, on balance we decline at this time to limit any retroactive effect our decision may have.

In his cross-appeal, Murphy has alleged that the trial court erred in awarding only $500.00 as attorney's fees in light of the evidence offered by the attorney that he spent 49.7 hours in preparation for and in the trial of the case. Murphy contends that the award should be for $3,727.50,[2] particularly since recovery was for $1,000.00, the maximum amount which can be awarded for a single violation.

Some of the guidelines for establishing a reasonable attorney's fee award are delineated in *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), and *Brown* v. *Bathke,* 588 F.2d 634 (8th Cir. 1978). The test to be applied on appeal in reviewing the attorney's fee award is whether the trial court abused its discretion in setting the amount of the fee. *Weeks* v. *Southern Bell T. & T. Co.,* 467 F.2d 95 (5th Cir. 1972), *reh. denied* 471 F.2d 650 (1973).

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[2]This is based on a charge of $75.00 per hour.

We recognize that the trial court considered many of the factors relative to the attorney's fee award in this action, but his memorandum opinion does not address the issue of whether the award was adequate to encourage enforcement of the Truth In Lending Act. The record here shows that plaintiff's attorney filed a complaint, conducted discovery by both deposition and interrogatory, then obtained leave to amend the complaint over the defendants' opposition, filed an amended complaint, submitted proposed findings of fact and conclusions of law, tried the case, and filed both trial and post-trial briefs.

Congressional goals expressed in the provisions of the Truth In Lending Act include the creation of a system of private attorneys general to aid in effective enforcement of the Act. *Soso* v. *Fite,* 498 F.2d 114, 121 (5th Cir. 1974); *Postow* v. *OBA Federal Savings & Loan Association,* _____F.2d _____ (slip opinion June 18, 1980).

Accordingly, we deem it appropriate to remand the issue of the reasonableness of the attorney's fee award to the District Court for reconsideration as to whether the award is adequate to encourage meritorious enforcement actions under the provisions of the Act.

On this appeal, Murphy shall be awarded an attorney's fee of $600.00 and also his appeal costs.

Affirmed in part and remanded in part for reconsideration of attorney's fees as indicated.

HENLEY, Circuit Judge, dissenting in part.

I find no abuse of discretion in the trial court's award of attorney's fee, and I dissent from so much of the opinion of the court as calls for remand for reconsideration of that award.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1822
September Term, 1979

Thaddeus S. Murphy,
Appellee,

v.

Ford Motor Credit Company and Hilltop Lincoln-Mercury, Inc,
Appellants.

No. 79-2061

Thaddeus S. Murphy,
Appellant,

v.

Ford Motor Credit Company and Hilltop Lincoln-Mercury, Inc.
Appellees.

Appeals for the United States District Court for
Eastern District of Missouri.

JUDGMENT
(Filed August 28, 1980

These causes came on to be heard on the designated record of the United States District Court for the Eastern District of Missouri and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and is hereby affirmed in part and remanded in part in accordance with the Court's majority opinion.

And it is further ordered by this Court that these causes be and are hereby remanded to the said District Court for proceedings consistent with this Court's opinion.

It is further ordered that Murphy shall be awarded an attorney's fee of $600.00 and also his appeal costs.

AUGUST 28, 1980

A true copy:

Attest: Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

October 7, 1980

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-1091C (A)

Thaddeus S. Murphy,
Plaintiff,

v.

Ford Motor Credit Company and Hilltop Lincoln Mercury, Inc.,
Defendants.

MEMORANDUM OPINION
(Filed August 29, 1979)

The complaint of the plaintiff, Thaddeus S. Murphy (hereinafter referred to as Murphy) alleges that the defendants, Ford Motor Credit Company (hereinafter referred to as Ford) and Hilltop Lincoln Mercury, Inc. (hereinafter referred to as Hilltop), violated Title I of the Consumer Credit Protection Act (hereinafter referred to as the Act), 15 USC USC 1601 et seq., commonly known as the Truth-in-Lending Act, and Regulation Z, 12 CFR 226.1 et seq., promulgated pursuant to said Act, in that the plaintiff and the defendants entered into a credit transaction, in the course of which credit transaction defendants failed to disclose the identity of Ford as a creditor and further failed to identify all of the property to which the security interests relate, the right to accelerate upon default, to put all required disclosures on the same side of the page, to put the required disclosures in meaningful sequence, and to provide plaintiff and the co-signer with a written disclosure statement.

This Court has jurisdiction pursuant to 15 USC 1640(e).

The pleadings, stipulation of facts, the credible testimony, and the exhibits disclose that plaintiff is a natural person who is and was at all times material a resident of St. Louis, Missouri. Defendant Ford is a corporation licensed to do business within the State of Missouri, and defendant Hilltop is a Missouri corporation with its principal place of business in St. Louis County, Missouri.

Murphy negotiated a buyer's purchase order for a 1977 Lincoln automobile with Hilltop, the terms consisting of a down payment of $1,000.00 and $7,900.00 financed at a ten percent add-on interest rate. Hilltop collected credit information from Murphy and sent this information by telephone to Ford. Several hours later Ford called Hilltop and stated that the loan was unacceptable with a down payment of $1,000.00, but would be acceptable with a down payment of $1,300.00.

Hilltop renegotiated the sale with Murphy, the new terms consisting of a down payment of $1,300.00 and $7,246.00 financed at a ten percent add-on interest rate. The contract was signed by Murphy, endorsed by Hilltop and sent to Ford.

Murphy alleges that both Hilltop and Ford were creditors for purposes of the Act. A "creditor" is defined as "a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit***." 12 CFR 226.2(s). Hilltop does not dispute that it was a creditor. Ford contends that it was merely an assignee of the installment contract. The contention is based upon three factors: (1) Hilltop was not required to sell the contract to Ford, (2) Ford was not required to accept the contract and in fact turned down approximately thirty percent of the contracts submitted by Hilltop, and (3) Ford did not dictate the terms (interest rate, number of payments and amount of down payment) of the contract.

There was no written agreement requiring Hilltop to sell its retail loans to Ford. However, since Ford provided Hilltop's

floor plan financing there was a "gentleman's understanding" that Hilltop would finance a majority of its loans with Ford. In 1978 Hilltop placed over fifty percent of its retail loans with Ford.

Ford turned down approximately thirty percent of the loans submitted by Hilltop. Hilltop did not finance any of its retail loans. If financing was not available for a particular loan no contract was signed. In any event, it is the loan accepted with which we are concerned. **Joseph** v. **Norman's Health Club, Inc.**, 532 F. 2d 86, 92 (8th Cir. 1976).

Ford has guidelines which were communicated to Hilltop and which controlled whether or not a loan would be approved. A dealer wishing to have its loans approved would conform to these guidelines. In the instant case the amount of the down payment was changed in order to receive approval by Ford.

These factors, considered together, indicate that Hilltop was the arranger of credit and served as a conduit between Murphy and the actual extender of credit, Ford. **Meyers** v. **Clearview Dodge**, 539 F. 2d 511, 515-16 (5th Cir. 1976), cert. denied, 431 U. S. 929 (1977), **Joseph**, *supra,* at 91-93.

Plaintiff's contention that Ford was not disclosed as a creditor on the face of the contract was disposed of by the Ninth Circuit in **Milhollin** v. **Ford Motor Credit Co.**, 588 F. 2d 753 (9th Cir. 1978), which held that the clause, "The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the assignment set forth on the reverse side hereof," adequately disclosed Ford as a creditor. **Milhollin**, *supra,* at 757. The clause in **Milhollin** was identical to the assignment clause in the instant case, and it is also held that Ford was adequately disclosed as a creditor.

This Court in **Whitlock** v. **Midwest Acceptance Corp.**, 449 F. Supp. 631 (E.D. Mo. 1977), at 637, stated: "[N]o specific order-

ing of disclosures is required by either the Act or Regulation Z so long as logically related terms are grouped together rather than scattered throughout the contract." This part of this Court's opinion was affirmed by the Eighth Circuit Court of Appeals, 575 F. 2d 652 (1978), although a part of the case was reversed. The terms of this contract are grouped together rather than scattered throughout the contract, and, therefore, plaintiff's contention that the contract terms are not in meaningful sequence is without merit.

The Eighth Circuit in **Griffith** v. **Superior Ford**, 577 F. 2d 455 (1978) held that acceleration clauses were not required to be disclosed on the fact of contracts by either the Act or Regulation Z. Contrary to plaintiff's contention, the **Griffith** opinion was not based upon Minnesota law and so is controlling in the instant case.

Plaintiff in his complaint alleges that he was not provided with a written disclosure statement. However, no evidence was introduced to support this claim and plaintiff's signature is on an acknowledgment stating that he received a copy of the contract. This signed acknowledgment constitutes prima facie proof of delivery. **Whitlock**, *supra*, 575 F. 2d 652, 653 (8th Cir. 1978).

Plaintiff contends that the defendants violated 12 CFR 226(a)(1) (required disclosures shall be made on the same side of the page and above the signature) by not including in the security interest disclosure the assignment of any monies payable under the physical damage insurance required in paragraph 18 of the contract. In the contract before the Court the disclosure with respect to the assignment of insurance was on the back page of the contract (Paragraph 18), while the signature was on the front page of the contract. The insurance assignment is a security interest for purposes of 15 USC 1638(a)(10) and 12 CFR 226.8(b)(5), and its non-disclosure on the same side of the page where the signature is found is a violation of 15 USC 1640(a).

Edmondson v. **Allen-Russell Ford, Inc.**, 577 F.2d 291 (5th Cir. 1978), cert denied 99 S. Ct. 2180, 60 L. Ed. 2d 1057.

The plaintiff is entitled to judgment from the defendants for failure to properly disclose the security interest with respect to the assignment of insurance. Accordingly, plaintiff is awarded judgment against the defendants in the amount of $1,000.00 and attorney's fees.

This memorandum opinion is adopted by the Court as its findings of fact and conclusions of law on the merits of the case, except with respect to attorney's fees, and the clerk of the Court will prepare and enter the proper order.

The case is set for hearing before the Court on the question of attorney's fees to be allowed on Friday, September 14, 1979.

Roy W. Harper
U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-1091C (A)

Thaddeus S. Murphy,
Plaintiff,

vs.

Ford Motor Credit Company
and Hilltop Lincoln Mercury, Inc.,
Defendants.

MEMORANDUM AND ORDER
(Filed November 14, 1979)

This matter is before the Court on plaintiff's motion for allowance of attorney's fees.

Plaintiff brought suit against defendants under the Consumer Credit Protection Act, commonly known as the Truth-in-Lending Act, and the regulations promulgated pursuant to said Act. The plaintiff alleged that in the course of the credit transaction in question defendants failed to disclose the identity of Ford Motor Credit Company as a creditor, and further failed to identify all of the property to which the security interests relate, the right to accelerate upon default, to put all required disclosures on the same side of the page, to put the required disclosures in meaningful sequence, and to provide plaintiff and the co-signer with a written disclosure statement.

The case was tried to the Court and the Court found that the plaintiff was entitled to judgment from the defendants for failure to properly disclose the security interest with respect to

the assignment of insurance, and awarded judgment against the defendants in the amount of $1,000.00 and attorney's fees.

At the time the case was tried it was agreed by the parties that the question of attorney's fees, if allowed, would be submitted to the Court at a later date under appropriate testimony. In the memorandum opinion filed by the Court the case was set a later date before the Court on the question of the attorney's fees.

Prior to the hearing before the Court on the question of attorney's fees, Kenneth M. Chackes, the attorney who tried the case for the plaintiff, being a member of the law firm of Chackes & Hoare, filed an affidavit in connection with the plaintiff's request for an award of reasonable attorney's fees. The affidavit in part set forth the amount of time he spent in connection with the case, totaling some 49.7 hours.

Mr. Chackes testified that he did all of the work with respect to the case; that he has been in practice since September of 1976; that $75.00 an hour for the 49.7 hours spent in connection with the case is a reasonable charge in Truth-in-Lending cases; that $75.00 an hour is reasonable because of the vast experience he has had in Truth-in-Lending matters; that with respect to Truth-in-Lending cases, most of which are settled without litigation, his usual fee agreement is to receive one-third of the amount recovered; that he has been involved in about twenty of these cases; that he has written several papers in this field and that a substantial part of the research he has done in this field was for the purpose of writing papers; that he has been awarded fees in other Truth-in-Lending cases, the fees allowed ranging from $500.00 to $1,400.00; and that with respect to the $500.00 fee alowed he claims 36 hours, and for the $1,400.00 fee allowed he claimed about 50 hours.

Bertram Cooper, a sole practicing attorney, who was formerly with the Legal Aid, testified that he is familiar with Truth-in-Lending cases; that his charge for Truth-in-Lending cases is $250.00 in advance as a retainer and one-third of the amount

recovered; that the fees charged by attorneys in the St. Louis area range from $50.00 to $100.00 an hour, based upon the complexity of the case and the experience of the attorney; and that he knows of no hourly rate on this type of litigation.

Richard Teitelman, an attorney with Legal Services since 1975, testified he had considerable experience in Truth-in-Lending cases; that he was familiar with the issues in this case; that the issues involved are not novel; that he has handled approximately seventy-five to a hundred cases of this type in Federal court; and that on cases of this type where he spent an average of thirty hours on the case when he applied for fees in the Federal court the fees allowed ranged from $250.00 to $750.00.

Turning to the affidavit of the plaintiff's attorney and his testimony in court, as previously set out, the attorney seeks compensation for 49.7 hours. The Court has no knowledge with respect to the claimed time except for the time he allegedly spent on April 11, 1979, in trying the case, which the attorney swears was three hours. In this connection, when the case was tried a stipulation signed and agreed to by the parties was filed with the Court, portions of depositions were read into the record, and one witness testified.

This Court through his clerk is required to make monthly reports of trials to the Administrative Office on JS-10 forms. The Court takes judicial notice of the report, which is placed in the file, and which the Court called to the attention of the plaintiff's attorney while he was testifying with respect to attorney's fees in this case. The report shows that one and one-half hours were spent in the trial of the case. Such report shows only time spent in hours or half hours, but the minutes of the court room clerk attached to the report show that the case was called at 10:00 a.m. and was completed at 11:20 a.m., to-wit, an hour and twenty minutes spent in the court room in this case before it was submitted to the Court.

Taking into consideration the actual trial time in comparison with the claim of Mr. Chackes for hours spent in the trial of the case, the fact that his claim for attorney's fees is based on an hourly rate that is not established as the hourly rate in the area for such work, that the hourly rate he claims is well above the hourly rate he charged with respect to other matters that he handled, the testimony of the other attorneys with respect to fees allowed in these types of cases, the fact that it is not a novel case, and that part of the claims upon which he sought recovery have prior to the trial of the case been ruled against such parties by the appellate court, the Court is of the opinion that the plaintiff is not entitled to the $3,727.50 which he requested.

The Court, therefore, fixes the attorney's fees to be paid by the defendants in this case in the sum of $500.00.

Roy W. Harper
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-1091C (A)

Thaddeus S. Murphy,
Plaintiff,

vs.

Ford Motor Credit Company
and Hilltop Lincoln Mercury, Inc.,
Defendants.

JUDGMENT
(Filed August 29, 1979)

In accordance with the Memorandum Opinion of the Court this day filed which is incorporated in and made a part of this judgment;

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of the plaintiff and against the defendants Ford Motor Credit Company and Hilltop Lincoln Mercury, Inc., in the sum of $1,000.00 and attorney's fees.

WILLIAM D. RUND, CLERK
U.S. DISTRICT COURT

By: Florence Bertel
Deputy Clerk

Entered by direction
of the Court this 29th
day of August, 1979.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-1091C (A)

Thaddeus S. Murphy,
Plaintiff,

vs.

Ford Motor Credit Company
and Hilltop Lincoln Mercury, Inc.,
Defendants.

FINAL JUDGMENT
(Filed November 14, 1979)

In accordance with the Memorandum Opinion of the Court on August 29, 1979 and the Memorandum Opinion of the Court this day filed which is incorporated in and made a part of this judgment;

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of the plaintiff and against the defendants Ford Motor Credit Company and Hilltop Lincoln Mercury, Inc., in the sum of $1,000.00 and attorney's fees in the amount of $500.00.

PHILLIP L. SWIHART, CLERK
U.S. DISTRICT COURT

Craig Liddy
Deputy Clerk

Entered by direction
of the Court this 14th
day of November, 1979.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1980

Nos. 79-19822 and 79-2061

Thaddeus S. Murphy,
Appellee/Cross-Apellant,

vs.

Ford Motor Credit Company
and Hilltop Lincoln-Mercury, Inc.,
Appellants/Cross-Appellees.

Appeals from the United States District Court
for the Estern District of Missouri.

The Court, having considered petitions for rehearing and suggestions for rehearing en banc of appellee/cross-appellant and appellants/cross-appellees and being now fully advised in the premises, hereby orders the petitions for rehearing and suggestions for rehearing en banc denied.

And it is further ordered by the Court that appellants/cross-appellees' motion for stay of mandate be and is hereby denied.

September 23, 1980

APPENDIX H

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1806

Jody James and Barbara James,
Plaintiffs-Appellants,

v.

Ford Motor Credit Company
and Del Norte Motor Company,
Defendants-Appellees.

Appeal form the United States District Court
for the District of Colorado
(D. C. No. Civ. 78-F-647)

(Filed June 24, 1980)

Richard J. Rubin (with him on the briefs were Paul L. Biderman and Timothy Meehan, attorneys for Northern New Mexico Legal Services, Inc. and Le Roy Cordova) for appellants.

Lawrence W. Treece (with him on the briefs were Holme, Roberts and Owen, Richard L. Schrepferman and Jeffrey A. Chase) for appellees.

Before SETH, Chief Judge, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This action, which arose in Colorado, seeks recovery of a statutory civil liability for failure to disclose in an automobile installment purchase contract the right of the seller to a returned and unearned insurance premium on a policy covering physical damage insurance. The claim is made under the Truth in Lending Act, TILA, 15 U.S.C. § 1601 *et seq.* as implemented by Federal Reserve Board Regulation Z, 12 C.F.R. § 226. The district court granted a motion to dismiss and the plaintiffs-buyers appeal. We affirm.

The plaintiffs-appellants, Jody and Barbara James, purchased a pick-up truck from defendant-appellee Del Norte Motor Company and executed an installment purchase contract which was assigned to Ford Motor Credit Corporation. The contract shows a cash price of $5395.00, down payments of cash and trade-in totalling $900.50, and a balance due of $4,494.50. To this are added other charges consisting of $359.84 for insurance and $5.50 registration fee. Also added is a finance charge of $1,238.92, at an annual interest rate of 15.40%. The balance due is payable in monthly installments of $169.41.

Paragraph 13 of the signed face page of the contract reads:

> "Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and to the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due thereunder."

Paragraph 15 on the face page provides that the terms and conditions on the reverse side are incorporated by reference. Paragraph 18 on the reverse side relates to insurance and among other things provides:

> "Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, * * *. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of the Seller."

TILA requires, 15 U.S.C. § 1631(a), that a creditor "clearly and conspicuously, in accordance with the regulations of the Board" disclose the information mandated by the Act. Reg. Z, 12 C.F.R. § 226.8(a) provides that all the disclosures be made on either:

> "(1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or
>
> (2) One side of a separate statement which identifies the transaction."

Failure to disclose properly the required information subjects the offender to a civil liability of not more than $1,000.00 plus reasonable attorneys' fees. 15 U.S.C. § 1640(a). The purchasers sue for the statutory liability and attorneys' fees. The trial court held that the assignment of the returned and unearned portion of the insurance premium was not a security interest under the Colorado version of the Uniform Commercial Code. See Colo. Rev. Stat. (1973) § 4-9-102.

TILA requires, 15 U.S.C. § 1638(a)(10), the disclosure of "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." The Act does not define "security" or "security interest." Reg. Z provides, 12 C.F.R. § 226.2(gg):

> " 'Security interest' and 'security' mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real pr operty mortgages, deeds of trust and [various liens and a lease interest securing performance of an obligation]."

The reference to the Uniform Commercial Code specifically declares that it is not a limitation. Although the interplay of federal and state law presents problems, the right to the TILA civil liability for nondisclosure rests on federal law. TILA is remedial legislation, designed to prevent predatory creditor practices, and must be liberally construed to effectuate the intent of Congress. See Mourning v. Family Publications Service, Inc., 411 U.S. 356, 365, and Littlefield v. Walt Flanagan and Company, 10 Cir., 498 F.2d 1133, 1136.

Three circuits have held that nondisclosure of the seller's right to unearned and returned premiums violates TILA and subjects the seller to the statutory liability. See Gennuso v. Commercial Bank & Trust Company, 3 Cir., 566 F.2d 291, cert. denied 441 U.S. 951; and Valencia v. Anderson Brothers Ford, 7 Cir., _____F.2d_____. The last of these, Valencia, was decided on March 20, 1980.

On March 31, 1980, the President approved the "Truth in Lending Simplification and Reform Act" as Title VI of the "Monetary Control Act of 1980." P.L. 96-221, 94 Stat. 132. Section 614(a) amends 15 U.S.C. § 1638(a), the disclosure section of TILA. Subsection (a)(9) reads, U.S. Cong. & Adm. News, No. 3, May 1980, 94 Stat. 179:

> "Where the credit is secured, [the creditor shall disclose to the extent applicable] a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not purchas-

ed as part of the credit transaction identified by item or type."

S.R. 96-368, U.S. Cong. & Adm. News, *supra,* p. 850, states the purpose of the 1980 amendments thus:

> "Despite the act's clear successes, however, there is a growing belief among consumers and creditors alike that the act could be substantially improved. There is considerable evidence, for example, that disclosure forms given consumers are too lengthy and difficult to understand. Creditors, on the other hand, have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation. In addition, this committee and other congressional and government sources have found the level of administrative enforcement by the Federal bank agencies seriously inadequate. In short, the committee believes that the interests of both consumers and creditors would be furthered by simplification and reform of the act."

With particular reference to the amendment of the disclosure requirements of § 1638(a), the Senate Report says, *Id.* p. 864:

> "The security interest disclosure is also simplified to eliminate the technical disclosure of the type of security interest taken. When a security interest is being taken in property purchased as part of the credit transaction, this section requires a statement that a security interest has been or will be taken in the property purchased. When a security interest is being taken in property not purchased as part of the credit transaction, *the Committee intends this provision to require a listing by item or type of the property*

securing the transaction, but not a listing of related or incidental interests in the property. For example, a loan secured by an automobile (not being purchased with the proceeds of the loan) would require a statement indicating that the loan is secured by an automobile but would not require a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums, rights arising under, or waived in accord with state law, accessions, accessories or proceeds." (Emphasis supplied)

S. Rep. No. 96-73 says, *Id.* at 879-880:

"The subcommittee learned that judging from consumer tests in other areas, the typical disclosure statement utilized today by creditors is not an effective communication device. Most disclosure statements are lengthy, written in legalistic fine print, and have essential truth in lending disclosures scattered among various contactual [sic] terms.

The result is a piece of paper which appears to be 'just another legal document' instead of the simple, concise disclosure form Congress intended."

Ford Motor Credit Co. v. Milhollin, ____ U.S. ____, 48 L.W. 4145, decided February 20, 1980, was concerned with the imposition of the statutory liability under TILA for a claimed nondisclosure of an acceleration clause. The Court concluded, 48 L.W. at 4146, that the issue of acceleration disclosure "is not governed by clear expression in the statute or regulation, and * * * it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth in lending enactments." The Court examined the Federal Reserve Board staff treatment of acceleration disclosure and denied imposition of the statutory liability.

We are aware of no administrative interpretations pertinent to the particular issue before us. Public Position Letter No. 377, quoted in Edmondson, 577 F.2d 295, n. 8, relates to life insurance, not physical damage insurance. Staff Letter 1263, Consumer Credit Guide (CCH) ¶ 31,736 (November 23, 1977), an unofficial interpretation, leaves to state law the question of whether a security interest has been acquired by the creditor and, if so, whether that interest has been adequately identified.

In Milhollin, *supra,* 48 L.W. at 4149, the Court said:

> "The concept of 'meaningful disclosure' that animates TILA (citation omitted), cannot be applied in the abstract. **Meaningful** disclosure does not mean **more** disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . 'informational overload' (citations omitted) and striking the appropriate balance is an empirical process that entails investigation into consumer phychology and that presupposes broad experience with credit practices." (Emphasis in original).

The Milhollin approach parallels the intent of Congress in enacting the 1980 amendments and the legislative history of those amendments. The effort is to strengthen the impact of TILA by simple, concise disclosures which can be understood by consumers and creditors. The installment contract in issue identifies the security interest taken in the property purchased, the pick-up truck. The insurance charge is specifically noted on the face of the contract and is included in the total amount which must be repaid in monthly installments. The insurance on damage to the vehicle was part of the credit transaction. The right of the seller to the returned premium would seem to be part of the "proceeds" of that transaction. If not such a part, the returned premium is property not purchased. The Senate Report, *supra* p. 864, says with reference to property not purchased, that the disclosure need not include "a listing of in-

cidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums." We are convinced that the Act does not require, and Congress did not intend it to require, an exemplification of that interest on the face of the installment contract. Because of this conclusion, we need not delve into the legal complexities of the Third Circuit decision in Gennuso, 566 F.2d 437; the Fifth Circuit decision in Edmondson, 577 F.2d 291; and the Seventh Circuit decision in Valencia, ____ F.2d ____.

The application of Milhollin and the 1980 actions of Congress present no retroactivity problem. We are concerned only with civil liability for nondisclosure. The buyers have shown no damage. Our decision establishes no new principle of law. Rather, it recognizes the congressional intent. Application to this case furthers the operation of TILA and produces an equitable result. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107.

Affirmed.

No. 78-1806 - JAMES v. FORD MOTOR CREDIT COMPANY, et al.

DOYLE, Circuit Judge, dissenting.

Because of my belief that the seller's right to unearned and returned premiums is a security interest, and thus the installment purchase contract here violates the Truth in Lending Act, I respectfully dissent.

The question is whether the provision in the contract which provides that the buyer assigns to the seller any monies payable under the insurance (on the car), including returned or unearned premiums, and which authorizes the seller on behalf of both parties to receive or collect same constitutes a violation of Truth in Lending Act.

Regulation Z, 12 C.F.R. Section 226.2(gg), defines security interest as meaning "any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code . . . ."

This problem is not a new one. Three circuits have considered this issue and have held that the nondisclosure of the seller's right to unearned and returned premiums violates the Truth in Lending Act and subjects the seller to the remedy which is being pursued here. The cases are Gennuso v. Commercial Bank & Trust Company, 566 F.2d 437 (3rd Cir. 1977); Edmondson v. Allen-Russell Ford, Inc., 577 F.2d 291 (5th Cir. 1978), *cert. denied* 441 U.S. 951; and Valencia v. Anderson Brothers Ford, ____ F.2d ____ (7th Cir. March 20, 1980).

The earliest of these decisions is Gennuso v. Commercial Bank & Trust Co., *supra*. Here the plaintiff charged that the Commercial Bank and Trust Company failed to properly identify in the Disclosure Statement and in the Note and Security Agreement a security interest in the proceeds and the unearned premiums in a property insurance policy covering the automobile that he had purchased. It was alleged that such failure violated the Truth in Lending Act and Regulation Z. No mention of the security interest in the insurance policy was made at the top of the note where the collateral was decribed. There had been some slight mention of the interest in question in the note and security agreement. It was held that the use of general language in this document was sufficient. It was said that the mention of the security interest in after-acquired property satisfied the requirements of the Act. The court held that the conduct of the bank constituted a violation of the Truth in Lending Act and Regulation Z as well.

To the same effect is Edmondson v. Allen-Russell Ford, Inc., *supra*. Here again the court held that the assignment of a returned or unearned premium of an insurance policy was a security

interest for purposes of Regulation Z, in accordance with the Truth in Lending Act, and had to be disclosed. The court, through Goldberg, J., had no difficulty concluding that the unearned portion of the premium was a security interest which had to be disclosed. The court relied on Gennuso v. Commercial Bank & Trust Co., *supra.* Here again the court ruled that it was inadequate to construe the general provision that the "Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof . . . ' " 577 F.2d at 295. The court said that the "lender must disclose the type of security interest held, retained, or acquired and the property of the borrower which serves or will serve as the collateral." 577 F.2d at 295. A sufficient description was determined to be essential.

The third of the recent circuit cases is Valencia v. Anderson Brothers Ford, *supra,* from the Seventh Circuit. The court said:

> We therefore affirm the district court's ruling that an assignment of unearned or returned insurance premiums in a consumer credit installment contract is a security interest for purposes of disclosure under the TILA. This result is consistent with the liberal interpretation to be given the Act, the majority of federal court decisions addressing the issue, and a Federal Reserve Board staff interpretation of a closely analogous issue. In view of the interest in uniformity in TILA disclosures and in the absence of any persuasive argument to the contrary, we decline to break with the Third and Fifth Circuits on this issue.

Slip op. at p. 14.

The majority was influenced by the fact that on March 31, 1980, the President approved the "Truth in Lending Simplification and Reform Act," which amended 15 U.S.C. Section 1638(a), the disclosure section of the Truth in Lending Act. As amended, it was pointed out by the majority that this section

permits disclosure of the principal property which provides the security for the loan. It does not require, so the Report says, a listing of related or incidental interests in the property, and it gives as an example a loan secured by an automobile which is not being purchased with the proceeds of the loan, but which would require a statement indicating that the loan is secured by an automobile. It would not require a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums.

The majority also calls attention to the recent opinion of the Supreme Court in Ford Motor Credit Co. v. Milhollin, ____ U.S. ____, 48 L.W. 4145, decided February 20, 1980, which adopted the approach that security documents have, in the past, carried too much excess luggage and that they should disclose with simplicity and should limit themselves to the disclosure of the matters having to do with the security itself. This may well be the present tendency, but at the time of the occurrence in question the approach which is shown by the Third, Fifth and Seventh Circuits obtained.

In summary, the automobile insurance policy and, of course, the premium which is paid to obtain the coverage, are part and parcel of the entire automobile financing business. It makes the loan more secure.[1] Thus the unearned premium which would ordinarily go to the insured and which is being held back by the lender is information of genuine interest to the purchaser-insured, and it is not possible to cause it to be unimportant.

---

[1] If, for example, the automobile were to be stolen or totaled out in an accident, there would be no security in the absence of insurance.

The new approach might render the procedure less complicated. Nevertheless, I submit that we are not justified in adopting this concept so as to apply it to the present set of facts and to do so only on the basis of legislative history which attended the enactment of the amendments. Even if the legislative history would call for a different result, it should not be applied here in a retroactive way.

For the reasons stated, I disagree with the majority opinion.

APPENDIX I

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Reg. 2; FC-0173]

Truth In Lending

Proposed Official Staff Interpretation

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed official staff interpretation.

SUMMARY: In accordance with 12 CFR 226.1(d)(2), the Board staff is publishing for comment official staff interpretation FC-0173 of Regulation Z, Truth in Lending, regarding security interest disclosures in closed end credit transactions. The proposed interpretation holds that a creditor need not disclose as a security interest its right to receive insurance proceeds or unearned premiums nor does it need to disclose that it is named as loss payee or beneficiary on an insurance policy.

DATES: Comments must be received on or before October 20, 1980.

ADDRESS: Comments (including reference to FC-0173) may be mailed to Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, or delivered to Room B-2223, 20th and Constitution Avenue, R.W., Washington, D.C. between 8:45 a.m. and 5:15 p.m. Comments may be inspected in Room B-1122 between 8:45 a.m. and 5:15 p.m.

FOR FURTHER INFORMATION CONTACT: Claudia J. Yarus, Staff Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551 (202-452-3667).

SUPPLEMENTARY INFORMATION:

(1) The text of official staff interpretation FC-0173 is published with identifying details deleted to the extent required to prevent a clearly unwarranted invasion of personal privacy. The Board maintains and makes available for public inspection and copying a current index providing indentifying information for the public, subject to certain limitations stated in 12 CFR Part 261.6.

(2) The letter is being issued as a proposal, rather than in final form, and interested persons are invited to submit relevant comment.

(3) After comments are considered, this official staff interpretation may be amended, may be withdrawn or may remain unchanged. Final action regarding this official staff interpretation will appear in the *Federal Register.*

(4) Authority: 15 U.S.C. 1640(f).

§ 226.2(gg) Creditor is not required to disclose as a security interest its right to receive insurance proceeds or unearned insurance premiums nor to disclose that it is named as loss payee or beneficiary on an insurance policy.

§ 226.8(b)(5) " " "

This is in response to your letter requesting an official staff interpretation regarding security interest disclosures under § 226.8(b)(5) of Regulation Z. You wish to know whether the creditor's right to receive proceeds or unearned premiums from a property or a credit life insurance policy must be disclosed as a security interest. You also ask if a security interest should be disclosed where a creditor requires that it be named as the loss payee on a property insurance policy or as the beneficiary on a credit insurance policy.

Section 226.8(b)(5) addresses disclosure of security interests in other than open end credit transactions. It requires disclosure

of the type of security interest taken and identification of the property to which that interest relates.

The staff believes that a creditor is not required by this section to disclose its right to receive insurance proceeds or unearned insurance premiums nor to disclose that it is named as loss payee or beneficiary on an insurance policy. Truth in Lending disclosures are meant to provide useful information to consumers to enhance credit shopping. Consumers do need to know that they risk the loss of certain property if they default. The disclosures under § 226.8(b)(5) inform consumers of which property is subject to that risk at the time the credit decision is being made. We believe that information regarding the creditor's interest in insurance proceeds and unearned premiums would not be used in comparison shopping. Although a technical reading of the security interest definition might cover a creditor's interest in insurance proceeds and unearned premiums, it is our opinion that such incidental interests are not the type of interests meant to be covered by § 226.8(b)(5).

The staff recognizes that there are a number of circuit court decisions to the contrary. We believe, however, that our position better serves the purpose of the statute and the regulation to convey in a meaningful way information that can be used by consumers in shopping for credit.

This is an official staff interpretation of Regulation Z, issued in accordance with § 226.1(d)(2). It is limited to the facts and issues discussed herein.

Sincerely,

Janet Hart
Director

Board of Governors of the Federal Reserve System, September 18, 1980

Theodore E. Allison
Secretary of the Board

[SEAL]

APPENDIX J

ACCOUNT NO. _____

MISSOURI AUTOMOBILE RETAIL INSTALMENT CONTRACT

DATE 3/9/78

Buyer (and Co-Buyer) - Name and Address (Include - County and Zip Code)

Thaddeus A. Murphy
2417 Ridge
St. Louis, Missouri 63112

Seller - Name and Address

HILLTOP LINCOLN-MERCURY, INC.
PAGE AT LINDBERGH BLVD.
ST. LOUIS, MO. 63114

Buyer (which means the undersigned Buyers and Co-buyers, jointly and severally) having been quoted both a deferred payment price and a lower cash price hereby purchases from Seller on a deferred payment price basis, upon the terms and conditions set forth on the face and reverse sides hereof, the following property (hereinafter called the "Property") delivery and acceptance of which in good order hereby are acknowledged by Buyer.

New or Used	Year and Make	Series	Body Style	No. Cyl.	If Truck Ton Capacity	Manufacturer's Serial Number	Use For Which Purchased
Used	1977 Lincoln	Cont.	2 dr.	8		7Y82A537826	☒ Personal ☐ Business ☐ Agriculture

INCLUDING:

☐ Radio ☐ Air Conditioner ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows ☐ _____

DESCRIPTION OF TRADE IN

None (Year and Make) $ No Allowance (Gross Allowance)

_____ (Serial Number) $ No Allowance (Amount Owing)

OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages:

(a) **Automobile Physical Damage Insurance:** Coverages checked below for a term of [redacted] months (or for such shorter term as the insurer to whom Seller shall apply therefor will provide for the amount included herein) from the date hereof, payable to Buyer or Seller as interests may appear:

☐ Comprehensive ☐ Fire-Theft & Combined Additional Coverage

☐ $_____ Deductible Collision ☐ Towing & Labor Costs ($25.00 Limit)

[redacted] (a)

(b) **Credit Life Insurance** on the life of _____ (Insured Person)

☐ Provided under Ford Life Insurance Company's Group Policy No. 2200 in accordance with the "Credit Life Insurance Eligibility" section below.

☐ Provided by MASS. INDEMNITY in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date.

[redacted] (b)

(c) **Credit Accident and Health Insurance** provided by

DETAILS OF TRANSACTION
(INCLUDING DISCLOSURES REQUIRED BY FEDERAL LAW)

(1) Cash Price *	[redacted]
Cash Down Payment	[redacted]
Trade In (See Opposite)	[redacted]
(2) Total Down Payment	[redacted]
(3) Unpaid Balance of Cash Price (Difference between Items 1 & 2)	[redacted]
(4) Other Charges	
Optional Insurance (See Opposite)	[redacted]
Official Fees	[redacted]
Taxes (Not included in Cash Price)	[redacted]
License, Title & Registration Fees	[redacted]
Total Other Charges	[redacted]
(5) Unpaid Balance - Amount Financed *	[redacted]
(6) FINANCE CHARGE *	[redacted]
(7) ANNUAL PERCENTAGE RATE [redacted] %	
(8) Total of Payments * (Sum of Items 5 & 6)	[redacted]

(9) **Payment Schedule:** Buyer hereby agrees to pay to Seller the Total of Payments (Item 8 above) in [redacted] monthly instalments of [redacted] each and one final instalment of [redacted] on the [redacted] day of each month commencing [redacted], or, if no date is specified, one month after the date of this contract.

NASS. INSURITY

in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date .....

(4) Other Optional Insurance _____

Total Cost of Optional Insurance ..... (Itemize)

NOTICE TO BUYER: (1) You are not required to obtain the Credit Life and/or Credit Accident and Health Insurance for which a charge is indicated above and such is not a factor in the Seller's approval of this credit. (2) You have the right to choose the person through whom the Automobile Physical Damage Insurance required under this contract is to be obtained. ACKNOWLEDGING the foregoing, BUYER requests and authorizes SELLER to obtain each insurance coverage for which an amount is included above.

[redacted] 3/8/78

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED.

CREDIT LIFE INSURANCE ELIGIBILITY

Credit life insurance under Ford Life Insurance Company's Group Policy No. 2200 is available only on the life of one natural person who is obligated to make payments under this retail instalment instrument and who is under the age of 66 on the date hereof. Benefits will be limited to a refund of premiums if there is no person eligible for such insurance, or if death results from suicide within one year from the date hereof or from certain pre-existing diseases or conditions within ninety days from the date hereof. For details see Notice of Proposed Group Credit Life Insurance on reverse side of Buyer's Copy.

The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

[redacted] HILLTOP LINCOLN-MERCURY, INC.

By. _____ Title _____

*** INCONSISTENT STATE DISCLOSURES**

The items of disclosure set forth above in the Details of Transaction are made in compliance with the Federal Truth in Lending Act. The following items required by the Missouri Motor Vehicle Time Sales Law differ only with respect to terminology and are disclosed at the item numbers indicated: Cash Sale Price at Item (1); Principal Balance at Item (5); Time Price Differential at Item (6); Time Balance at Item (8); and Time Sale Price at Item (11).

(10) **Balloon Payment(s)** [redacted]

(Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment)

A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.

(11) **Deferred Payment Price*** (Sum of Items 1, 4 & 6) [redacted]

(12) **Delinquency Charges:** Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law.

(13) **Security Interest:** Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

(14) **Prepayment Rebate:** Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after deducting from such rebate an acquisition fee of $15.00. No rebate will be made if the amount thereof is less than $1.00.

(15) **Additional Terms and Conditions:** The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

NOTICE TO THE BUYER.

DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND TO OBTAIN A PARTIAL REFUND OF THE TIME PRICE DIFFERENTIAL.

Buyer acknowledges receipt of a true and completely filled in copy of this contract at the time of signing.

[redacted]

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

[redacted]

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16. ASSIGNMENT

The original Seller may assign this contract and his assignee shall acquire all of his interest in this contract and the Property and shall be entitled to all the rights and privileges of Seller hereunder. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder hereof and the original Seller shall not be the agent of the holder for transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property.

17. USE OF PROPERTY – WARRANTIES

Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller.

18. RISK OF LOSS – INSURANCE

The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverages for the term indicated for the amount included herein, Seller may (i) obtain such coverages for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing instalments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to his rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

19. DEFAULT

Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of seizure or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Upon request, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency. Any personality in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay reasonable attorneys' fees (15% if permitted by law) and other expenses incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

20. GENERAL

No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state in which the original Seller is located as shown on the face of this contract.

GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guaranties the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with a reasonable attorney's fee (15% of the amount then due, or if prohibited, the amount permitted by law) if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law.

Guarantor _____ Address _____

Guarantor _____ Address _____

ASSIGNMENT

The Seller named on the face of this contract sells, assigns, and transfers to Ford Motor Credit Company (hereinafter called "FMCC") his, its or their entire right, title and interest in and to the within contract and the Property described therein and authorizes FMCC to do every act and thing necessary to collect and discharge obligations arising out of or incident to said contract and assignment. In order to induce FMCC to accept assignment of the contract, the Seller warrants that the contract, and guaranty if any, are genuine, legally valid and enforceable and arose from the sale of said Property, said Property is as described in the Buyer named therein who was quoted both a time price and a lesser cash price; the within contract was complete in all respects and Seller made all disclosures required by law prior to the execution thereof by Buyer; the Buyer is not a minor, has capacity to contract and paid the down payment stated in the contract with his own funds; all statements made by or on behalf of the Buyer and furnished to FMCC by the Seller are true to the best of the Seller's knowledge and belief, and the Seller has no knowledge of any fact that would impair the validity or value of the contract; Seller is and will be vested in the Seller free of all liens and encumbrances and the Seller has the right to assign said title, and a certificate of title showing said Property free of any lien or encumbrance for the benefit of FMCC or the Seller has been or will be applied for forthwith if permitted by law. If there is a guaranty, Seller warrants the foregoing warranties, without regard to the Seller's knowledge or lack of knowledge with respect thereto, or FMCC's reliance thereon. Seller agrees unconditionally to purchase said contract from FMCC, upon demand, for the full amount then unpaid whether said contract shall then be in default. Seller further agrees that in event Buyer or any other person makes a claim against FMCC alleging facts which, if true, would constitute a breach of any of the foregoing warranties, Seller shall assume the defense of such claim and shall indemnify and save FMCC harmless from all loss, cost and expense arising therefrom. In addition, this assignment includes the provisions of the paragraph initialed by the Seller below, provided, however, if none of the paragraphs below has been initialed by Seller, this assignment shall include the provisions of the paragraph below entitled "Partial Guaranty" and "Repurchase". The liability of the Seller shall not be affected by any extension, renewal or other change in the time of payment of the said contract or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for payment thereof or the release or non-perfection of any security thereunder. FMCC shall not be bound to exhaust its recourse against the Buyer or any other person or any security FMCC may at any time have before being entitled to payment from the Seller hereunder. The Seller waives notice of the acceptance of this assignment and notices of non-payment and non-performance of the contract and any other notices required by law and waives all setoffs and counterclaims. This assignment shall become effective upon delivery of the within contract to FMCC or upon FMCC's payment of the purchase price thereof whichever first occurs.

☐ Initial **"WITHOUT RECOURSE"** The assignment of said contract is and shall be without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial **"REPURCHASE"** The Seller guaranties payment of the full amount remaining unpaid under said contract, and covenants if default be made in payment of any instalment thereunder to pay the full amount then unpaid to FMCC upon demand, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial **"LIMITED REPURCHASE"** The Seller guaranties payment of the full amount remaining unpaid under said contract, and covenants, if default be made in payment of any instalment thereunder to pay the full amount then unpaid to FMCC upon demand, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted, provided, that if the Buyer contemporaneously pays each of the first _____ instalments coming due under the within contract, this assignment shall thereafter be without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial **"PARTIAL GUARANTY"** Notwithstanding the terms of the Ford Motor Credit Company Retail Plan, the Seller unconditionally guaranties payment of the full amount remaining unpaid under said contract, and agrees to purchase said contract from FMCC upon demand for the full amount then unpaid whether said contract shall then be, or not be, in default, provided, however, at the time of any such demand by FMCC Seller may, at his election, pay to FMCC the sum of $_____. In consideration of Seller's reduced guaranty obligation, and in such event, the assignment of said contract is without recourse against the Seller, except as otherwise provided by the terms of the FMCC Retail Plan in effect at the time this Assignment is accepted.

☐ Initial **"FULL GUARANTY"** Notwithstanding the terms of the Ford Motor Credit Company Retail Plan, the Seller unconditionally guaranties payment of the full amount remaining unpaid under said contract, and agrees to purchase said contract from FMCC, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default.